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FINA Doping Panel 06/10

FINA Doping Panel

comprised of

F.D. van Heijningen	(NED)	Chairman
William Bock, III	(USA)	Member
Farid Ben Belkacem	(ALG)	Member

In the proceedings against

the swimmer **Daynara Lopes Ferreira De Paula**
affiliated to the Brazilian Swimming Federation

represented by: Mr. Cristiano Caús
São Paulo, Brazil

I THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing disciplines related to swimming. FINA has established and is carrying out, *inter alia*, a doping control program, both for in-competition as well as out-of-competition testing.

1.2. The BRAZILIAN SWIMMING FEDERATION (BSF) is a member of FINA. BSF is required to recognize and comply with FINA's anti-doping rules which are set out in the FINA Doping Code ("FINA DC"). The FINA DC is directly applicable to, and must be followed by, *Competitors, Competitor Support Personnel, coaches, physicians, team leaders, and club and representatives under the jurisdiction of the BSF.*

1.3 Ms. Daynara Lopes Ferreira De Paula (hereafter: Ms. De Paula) is a twenty (20) year old female Brazilian swimmer. She lives in



São Paulo, Brazil and trains at the Minas Tennis Club. She was previously selected to compete for the Brazilian national swimming team at the 2009 World Championships in Rome.

II PROCEEDINGS

2.1 By letter dated 14 May 2010, the FINA Executive Director advised Ms. De Paula that the A samples of in-competition doping control tests conducted on 26 and 27 March 2010 had tested positive for the prohibited substance Furosemide. Ms. De Paula was advised that she could arrange for analysis of the B Samples.¹

2.2 The B Sample analysis was conducted on 8 July 2010 at the UCLA Olympic Analytical Laboratory. Ms. De Paula attended the B Sample analysis along with her representative.

2.3 By letter dated 12 July 2010, Ms. De Paula was advised by the FINA Executive Director that the B sample analysis had confirmed the A sample findings that the prohibited substance Furosemide was present in her urine samples. Ms. De Paula was further advised that her case would be forwarded to the FINA Doping Panel for further consideration.

2.4 The FINA Doping Panel was formed pursuant to FINA Rule C 21.6.

¹ Ms. De Paula's samples from the ODESUR 9th South American Games in Medellin, Columbia were originally sent to the WADA accredited laboratory in Bogotá, Columbia. For reasons not relevant to the Panel's decision in this case the samples were transferred to the UCLA Olympic Analytical Laboratory in Los Angeles, California in the United States for analysis. Ms. De Paula originally learned on or about 26 April 2010 that the Bogotá laboratory had declared her sample positive for Furosemide.

2.5 The FINA Doping Panel hearing was held on 20 August 2010 in FINA Headquarters, Lausanne (SUI).

2.6 Ms. De Paula attended the hearing in person and was represented at the hearing by Mr. Cristiano Caús, an attorney from São Paulo, Brazil. Ms. De Paula and the Panel were ably assisted by Ms. Monica Lange, a registered interpreter.

III JURISDICTION AND APPLICABLE RULES

3.1 The jurisdiction of the FINA Doping Panel arises out of the following provisions of the FINA Rules: C 21.5., C 21.6 and FINA DC 8.1.

3.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since January 1, 2009 (amended on the occasion of the FINA General Congress on 24 July 2009).

IV LEGAL DISCUSSION

THE FACTS

MS. DE PAULA'S FACTUAL CONTENTIONS

4.1 Ms. De Paula did not dispute the accuracy of the laboratory testing which found the prohibited substance Furosemide in her urine samples.

4.2 She contended that the Furosemide found in her sample resulted from the ingestion of a specially prepared nutritional supplement prescribed by a licensed nutritionist and prepared by a licensed pharmacy.

4.3 Ms. De Paula testified that her nutritionist prescribed her a "green tea" supplement, instead of a "caffeine" supplement previously prescribed, in order to help her combat fatigue and improve a depressed immune system. She used to take her supplements just before a race and during training.

4.4 Ms. De Paula contends that she took numerous precautions to avoid ingesting a prohibited substance, that Furosemide was not on the list of ingredients for her supplement prescribed by her nutritionist and that she did not intend to enhance her performance or mask the use of a prohibited substance through her ingestion of Furosemide.

FACTUAL FINDINGS

4.5 Furosemide is a prohibited substance under Class S5.(Diuretics and Other Masking Agents) of the 2010 Prohibited List International Standard adopted by the World Anti-Doping Agency (WADA) and is therefore prohibited at all times, in and out of competition, pursuant to FINA DC 4.1.

4.6 Athletes subject to the WADA Prohibited List may not use Furosemide without a valid TUE.

4.7 Ms. De Paula's nutritionist prescribed a special supplement known as "Capsules Café" and containing a variety of ingredients, including Extrato de Chá Verde (300mg), Cafeina (caffeine) (70mg), Paullinia cupana (300mg), Taurina (500mg). None of these ingredients are prohibited under the WADA Prohibited List.

4.8 Ms. De Paula's nutritionist was licensed, provided by the Minas Tennis Club at which Ms. De Paula trained, and had substantial experience in sports nutrition.

4.9 Ms. De Paula discussed the WADA Prohibited List with her nutritionist and was assured that the supplement she was prescribed did not contain any prohibited substance.

4.10 Ms. De Paula checked the ingredients on her prescription against the listed substances on the WADA prohibited list and did not find any prohibited substances on the prescription.

4.11 Ms. De Paula took the prescription to an accredited pharmacy in order for the pharmacy to mix the supplement. The pharmacy chosen by Ms. De Paula was a large pharmacy and used by some physicians at the Minas Tennis Club. However, Ms. De Paula did not inquire regarding the qualification of the pharmacy to mix supplements or whether when mixing supplement ingredients there was a prospect for contamination with prohibited substances.

4.12 After receiving the supplement mixed by the pharmacy, Ms. De Paula regularly used the specially prepared supplement particularly on days when she trained and competed.

4.13 Ms. De Paula declared her use of the supplement "Capsules Café" on her doping control form.

4.14 Upon learning of her positive drug test Ms. De Paula promptly discontinued use of the Capsules Café and other supplements and had laboratory testing performed on her supplements.

4.15 Ms. De Paula's supplements were tested by a laboratory known as ACCERT Chemistry and Biotechnology, a certified testing laboratory in Brazil.

4.16 Using the HPLC-MS/MS method the ACCERT laboratory found Furosemide in the supplement capsules prepared by the pharmacy pursuant to the prescription of Ms. De Paula's nutritionist.

4.17 The Panel found Ms. De Paula's testimony to be credible and persuasive.

4.18 For the reasons set forth in the legal discussion below, the Panel finds that Ms. De Paula did not intend to enhance her performance or mask the use of a Prohibited Substance through the ingestion of Furosemide.

MS. DE PAULA'S LEGAL POSITION

4.19 Ms. De Paula's counsel contended that pursuant to the specified substance provision set forth in FINA DC 10.4 that Ms. De Paula should be sanctioned with no period of ineligibility or that her period of ineligibility should be reduced substantially below the standard two year period of ineligibility for a first anti-doping rule violation.

THE LAW

4.20 The FINA Doping Control Rules are founded on the fundamental premise contained in FINA DC 2.1.1 that:

It is each *Competitor's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Competitors* are responsible for any *Prohibited Substance* or its

*Metabolites or Markers found
to be present in their Samples.*

4.21 Furosemide is a "Specified Substance" pursuant to FINA DC 4.2.1. Consequently, pursuant to FINA DC 10.4 if certain factors are met the otherwise applicable period of ineligibility can be reduced to at a minimum a reprimand and a maximum of two years ineligibility.

4.22 The factors which must be established in order for an athlete to qualify for treatment under FINA DC 10.4 are:

- a. The swimmer must establish by a balance of probabilities how the Specified Substance entered his or her body or came into his or her Possession; and
- b. The swimmer must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance.

4.23 If the foregoing factors are proved by the swimmer then the swimmer's degree of fault is the criterion considered in assessing any reduction of the period of ineligibility.

4.24 Ms. De Paula established by a balance of probabilities how the Furosemide entered her body by establishing with laboratory testing that her nutritional supplements were contaminated with Furosemide and by adequately discounting any other possible sources of the drug.

4.25 Ms. De Paula also produced corroborating evidence which established to the Panel's comfortable satisfaction that she did not intend to enhance sport performance or mask the use of a performance enhancing substance. Such corroborating evidence included:

- a. The fact that her nutritional supplement was prescribed by a licensed nutritionist and that the ingredient list on the prescription signed by the nutritionist contained no prohibited substance;
- b. The fact that Ms. De Paula's supplement was prepared by an accredited pharmacy and not by an unregulated supplement manufacturer;
- c. Declaration of the nutritional supplement on Ms. De Paula's doping control form;
- d. The fact that the substance found in her supplement was a diuretic while the nutritionist had prescribed a supplement in order to combat tiredness and a depressed immune system and not for any purpose for which a diuretic is typically used;
- e. The relatively low level of Furosemide found in Ms. Dynara's sample; and
- f. The finding by an independent laboratory that Furosemide was contained in her supplement

4.26 Accordingly, Ms. De Paula established her entitlement to a sanction within the range specified by FINA DC 10.4.

SANCTION

4.27 In considering whether Ms. De Paula should receive any period of ineligibility, and, if so, what period of ineligibility was appropriate the Panel considered Ms. De Paula's degree of fault as instructed by FINA DC 10.4.

4.28 The degree of care to be expected from Ms. De Paula was high as she was using a nutritional supplement when athletes have been regularly warned of the danger of using supplements, specifically the risk of contamination.

4.29 Further, her degree of care was somewhat higher because she used the supplement at least in part in order to prepare for competitions. Athletes should be particularly vigilant when using a product designed as a stimulant to assist preparation for a competition.

4.30 The Panel finds Ms. De Paula at fault for using a nutritional supplement without any inquiry regarding how the supplement was prepared. Although the supplement was mixed at a pharmacy, Ms. De Paula undertook no analysis of the qualifications of the pharmacy, did not investigate whether prohibited substances were also mixed at the pharmacy, did not communicate with the pharmacist regarding the purity of her supplement or her obligation to avoid any prohibited substances and received no assurances regarding the purity of the supplement she received. Furthermore, she did not contact a physician of the Brazilian Olympic Committee or Swimming Federation, to check the specific supplement and its origin.

4.31 Factors weighing in Ms. De Paula's favor include the fact that her positive drug test arose in connection with a product prescribed by a licensed nutritionist and prepared at a licensed pharmacy. Although Ms. De Paula used a supplement she relied upon a nutritional

professional to try to ensure that the supplement mixture would not contain a prohibited supplement. By going to a licensed nutritionist with a sports nutrition background and by taking the prohibited substances list to meetings with her nutritionist Ms. De Paula undertook tangible steps to try to avoid ingesting a prohibited substance. While there is no question that she could have done more, and that mere ingestion of a sports supplement carries significant risk, the steps that Ms. De Paula did take, were significant and justify a reduction of her period of ineligibility from the two (2) year maximum sanction allowable under Article 10.4. Ms. De Paula also showed significant remorse for her mistake and immediately discontinued use of the product following notice of her positive drug test.

4.32 The Panel notes that under FINA DC 10.4 and similar rules adopted by other International Federations athletes who demonstrated that their use of a diuretic was not intended to mask a prohibited substance or enhance performance have received a substantially reduced period of ineligibility.

4.33 Under these circumstances, the Panel believes a six (6) month period of ineligibility is appropriate under the FINA Doping Control Rules.

4.34 Pursuant to FINA DC 10.9 Ms. De Paula's period of ineligibility shall run from 20 August 2010, the date of the hearing in this matter and the date on which the Panel issued its interim decision setting forth its basic determination and disposition without a full reasoned award.

4.35 Pursuant to FINA DC 10.8 all competitive results obtained from the date of a positive sample through the commencement of any

provisional suspension or ineligibility period shall, unless fairness requires otherwise be disqualified.

4.36 Ms. De Paula did not serve a provisional suspension.

V. CONCLUSION

5.1 Ms. Daynara De Paula receives a six (6) month period of ineligibility commencing on 20 August 2010, and ending at the conclusion of 19 February 2011, for her first anti-doping rule violation.

5.2 All results obtained by Ms. De Paula on or after 26 March 2010 and through and including 20 August 2010 are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

5.3 All costs of this case shall be borne by BSF in accordance with FINA DC 12.2.

5.4 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this judgment (FINA Rule C 12.9.3).

F.D. van Heijningen
Chairman

William Bock III
Member

Farid Ben Belkacem
Member

Signed on behalf of all three Panel Members



F.D. van Heijningen